Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-961

NEW YORK TELEPHONE COMPANY, WESTERN ELECTRIC COMPANY, AMERICAN TELEPHONE & TELEGRAPH COMPANY, LONG LINES DEPARTMENT, AND EMPIRE CITY SUBWAY COMPANY (LIMITED),

Petitioners,

v.

NEW YORK STATE DEPARTMENT OF LABOR, LOUIS L. LEVINE, INDUSTRIAL COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF LABOR, NEW YORK STATE DEPARTMENT OF TAXATION & FINANCE, AND JAMES H. TULLY, JR., STATE COMMISSIONER OF TAXATION & FINANCE,

Respondents.

PETITIONERS' REPLY BRIEF

DAVID L. BENETAR
STANLEY SCHAIR
MARK H. LEEDS
ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN
469 Fifth Avenue
New York, New York 10017
Attorneys for Petitioners

Of Counsel

GEORGE E. ASHLEY
General Counsel
WILLIAM P. WITMAN
Labor Counsel
NEW YORK TELEPHONE COMPANY
ROBERT A. LEVITT
Labor Counsel
LAUREL J. McKEE
Attorney
WESTERN ELECTRIC COMPANY
EDGAR MAYFIELD
Vice President &
General Attorney
ALFRED G. WALTON
Assistant General Attorney
AMERICAN TELEPHONE &
TELEGRAPH COMPANY
LONG LINES DEPARTMENT

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Although the Court of Appeals effectively accepted the District Court's clear-cut findings concerning the substantial impact on collective bargaining and strikes of unemployment compensation for strikers, Respondents still resist them, devoting a full segment of their brief in opposition to minimizing that impact as so found (R. 2-5).* Pursuing this same tack of discussing the merits of the decision below rather than its jurisprudential implications as they relate to certiorari review, Respondents discuss

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* Reference is to Brief for Respondents in Opposition.

the congressional history on which much of the disagreement in the courts below centers (R. 10-14).

In the interests of brevity and to avoid compounding the error of prematurely briefing the merits of this case, we shall not burden this reply by further discussion of the merits of either of these questions. Instead, we shall focus on the conflicts among the circuits presented by this case and the confusion thereby engendered, all of which call for review by this Court.

(1)

Respondents attempt to downplay the substantial differences between the First and Second Circuits by characterizing the conflict as "fall[ing] far short of providing a basis for the granting of certiorari" (R. 14-15). But the Second Circuit was quite explicit in spelling out its disagreements with the First Circuit and with the federal district court in Hawaii. Thus, in this connection, it stated:

> In a preemption case such as this one, "the crucial inquiry [is] whether Congress intended [this field to] be unregulated because [it was] left 'to be controlled by the free play of economic forces.'" Accordingly, we must examine congressional intent. Those courts that have considered Congress' intent with respect to the payment of unemployment benefits to strikers have found it "ambiguous." *We do not agree.* [6a-7a; footnote and citations omitted; emphasis supplied].

Where the Second Circuit, as a matter of law, found the issue of congressional intent dispositive and ordered the dismissal of the complaint in this case, the First Circuit, in *Grinnell,* refused to uphold dismissal of the complaint

therein on that ground (although urged to) and remanded the case for a trial. This is not merely of academic significance as Respondents would have it believed (R. 5). Indeed, the conflict between those decisions is already taking its toll in confusion among and between courts. For example, as footnoted in Respondents' brief (p. 17), at least two federal district courts (Virgin Islands and Illinois) have dismissed preemption challenges to the payment of unemployment compensation to strikers relying in part on the Second Circuit's position as to the controlling force of the legislative history. Several other district courts, in refusing to grant motions to dismiss, have expressly rejected this view and, instead, have followed the First Circuit's contrary position. These include district courts in Michigan, Hawaii and New York in the cases cited and discussed at pages 12-14 of the petition herein. *See also* the district court's decision in *Westinghouse Broadcasting Co.* v. *Commonwealth of Massachusetts,* Civil Action No. 76-1409-S (D. Mass. Apr. 26, 1976).*

(2)

Respondents' extensive references in their brief to this Court's summary dismissal of the appeal in *Kimbell* (R. 5, 6, 7, 8, 9, 15, 16, 17) serve but to provide additional reasons for granting the writ here sought. The application of

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* That the Second and First Circuits may have had some "shared doubts" on preemption, as contended by Respondents (R. 15), is belied not only by the conflict just discussed but also by the fact that whatever doubts were expressed by the First Circuit concerning an employer's ability to amass the necessary proof on impact, they were not shared by the Second Circuit which accepted the district court's conclusion in this case that the impact of unemployment compensation to strikers on the federal labor policy was substantial and proven.

Kimbell under this Court's *Hicks* doctrine has created a conflict among the circuits which, in turn, has served to compound the existing uncertainties, earlier discussed, with which lower courts already are faced in deciding cases involving challenges to state unemployment compensation laws which pay benefits to strikers. That conflict was described by the Second Circuit as follows (7a n.2):

> In *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* 429 U.S. 804 (1976), the Supreme Court dismissed, for want of a substantial question, an appeal which raised, *inter alia,* the question at issue here. *Kimbell, Inc.* v. *Employment Security Commission of New Mexico,* No. 10323 (N.M. Sup. Ct. Dec. 29, 1975), *rev'g, Albuquerque-Phoenix Express, Inc.* v. *Employment Security Commission of New Mexico,* 88 N.M. 596, 544 P.2d 1161 (1975). We must therefore decide whether, under the doctrine of *Hicks* v. *Miranda,* 422 U.S. 332 (1975), the *Kimbell* dismissal is controlling. *See generally* Comment, The Precedential Weight of a Dismissal by the Supreme Court for Want of a Substantial Federal Question: Some Implications of *Hicks* v. *Miranda,* 76 Colum. L. Rev. 508 (1976). We agree with the district court that it is not. *See also Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977). The district court's view has been confirmed by subsequent indications from the Supreme Court itself. *Ohio Bureau of Employment Servs.* v. *Hodory,* 45 U.S.L.W. 4544, 4545 n.3 (May 31, 1977); *Batterton* v. *Francis,* 45 U.S.L.W. 4768, 4770 n.7 (June 20, 1977). We are aware of the contrary decision of the Third Circuit in *Super Tire Eng'ring Co.* v. *McCorkle,* 550 F.2d 903 (3d Cir.), *cert. filed,* 46 U.S.L.W. 3110 (U.S. Aug. 30, 1977), and we respectfully disagree with that Court. We note that *Super Tire* was decided prior to *Hodory* and *Batterton.*

District courts in Hawaii, Michigan and New York similarly have ruled that this Court's dismissal in *Kimbell* was not dispositive of the challenges to state unemployment statutes before them. *Hawaii Employers Council* v. *State of Hawaii Dep't of Labor & Indus. Rel. (Pearl Harbor Fed. Credit Union),* Civil No. 74-262 (D. Hawaii July 5, 1977);* *Dow Chem. Co.* v. *Taylor,* 428 F. Supp. 86 (E.D. Mich. 1977), *certified to 6th Cir.* (E.D. Mich. May 19, 1977) (No. 77-8064); *American Broadcasting Cos.* v. *New York State Dep't of Labor,* 77 Civ. 2995 (S.D.N.Y. June 30, 1977). *See also Olin Corp.* v. *State of Illinois Dep't of Labor,* Civ. No. 77-5156 (S.D. Ill. Jan. 9, 1978) (*appeal filed* 7th Cir.). The Michigan ruling is now before the Sixth Circuit on a certified question. The Third Circuit's contrary view, however, was found controlling recently by a district court in the Virgin Islands. *Virgin Islands Telephone Corp.* v. *Upson,* Civ. No. 77-276 (D. Virgin Islands Nov. 11, 1977).

The summary dismissal in *Kimbell,* of course, is not binding on this Court. *Edelman* v. *Jordan,* 415 U.S. 651, 670-71 (1974). In light of the conflict among the circuits as to the scope and reach of the *Kimbell* ruling as applied in the lower courts and of the uncertainties it has produced in the district courts, it is appropriate that this Court grant the writ sought herein and settle the labor preemption question presented.

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* This was one of four cases consolidated for hearing in Hawaii.

That this question is of widespread importance cannot be doubted. More than fifteen cases presenting it are now pending before the federal courts.* And, as illustrated by the briefs *amici curiae* filed in support of the petition, large and varied segments of the business community spanning the entire country are urging review of the decision below.**

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: New York, New York
February 22, 1978

Respectfully submitted,

DAVID L. BENETAR
STANLEY SCHAIR
MARK H. LEEDS
ARANOW BRODSKY BOHLINGER
BENETAR & EINHORN
469 Fifth Avenue
New York, New York 10017
(212) 889-1470
Attorneys for Petitioners

* In addition to those cited in the petition (p. 15), see *Olin Corp.* v. *State of Illinois Dep't of Labor, supra; Wyman Gordon Co.* v. *Bowling*, No. 77 C 3540 (N.D. Ill.).

** Although not before this Court, some 23 unions intervened in this case as *amici curiae* before the Second Circuit.

Of Counsel
GEORGE E. ASHLEY
General Counsel
WILLIAM P. WITMAN
Labor Counsel
NEW YORK TELEPHONE COMPANY
1095 Avenue of the Americas
New York, New York 10036

ROBERT A. LEVITT
Labor Counsel
LAUREL J. McKEE
Attorney
WESTERN ELECTRIC COMPANY
222 Broadway
New York, New York 10007

EDGAR MAYFIELD
Vice President & General Attorney
ALFRED G. WALTON
Assistant General Attorney
AMERICAN TELEPHONE & TELEGRAPH COMPANY
LONG LINES DEPARTMENT
Bedminster, New Jersey 07921